

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

APPEAL NO.127 OF 2007

IN

JUDGES ORDER NO.494 OF 2006

IN

ARBITRATION PETITION NO.242 OF 2005

AND

ARBITRATION PETITION NO.66 OF 2005

The Ambajogai Peoples Co-operative
Bank Ltd., Ambajogai, Taluka Ambajogai
Dist. Beed.

..Appellant.

Vs.

1. M/s. Shrimauli Builders
having its principal place of business
at B-1001, Kumarpuram, Mukundnagar,
Pune 411 037.
2. Bangalore Water Supply And Sewerage
Board having their Registered office at
9th floor, Cavary Bhavan, Kempegowda
Road, Bangalore 09.
3. Angerlehner Michel Construction Pvt. Ltd.
A company incorporated under the
Provisions of the Companies Act, 1956
having its registered office at A-704
Shubh Shanti Complex, M.G. Road,
Kandivali (W), Mumbai 400 067.

..Respondents.

and

L & T Finance Ltd.
Having its registered office at L & T
House, Ballard Estate, Mumbai 400 001,
Inter alia, Office at Swastik Chambers,
802, 8th floor, CST Road, Chembur,
Mumbai 400 071.

..Respondent No.4
(Non party intervener)

....

Mr. T.N. Subramanian, Senior Advocate with Mr. J.P. Sen and Ms. Sheetal Shah i/b Mehta Girdharilal for the Appellant.

Mr. S.B. Rao i/b Ms. Gauri Rao for Respondent No.1.

Mr. Virag Tulzapurkar, Senior Advocate with Mr. Dubhash i/b Munir Merchant for Respondent No.3.

Ms. Shakuntala Joshi for Respondent No.4.

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CORAM: R.M. S. KHANDEPARKAR &
DR. D.Y. CHANDRACHUD, JJ.

Judgment reserved on 21st September, 2007.

Judgment pronounced on 9th October, 2007.

JUDGMENT (Per DR. D.Y. CHANDRACHUD, J.) :

1. The Appeal in these proceedings is directed against an order of a Learned Single Judge dated 15th February, 2007, dismissing Judges Order 494 of 2006 filed by the Appellant for the payment to it of a sum of Rs.2.12 Crores deposited by the Second Respondent in an arbitration petition, along with the interest accrued thereon. The Appellant is a co-operative bank of which the First Respondent is a member. The Appellant had advanced monies to the First Respondent and upon a default committed by

the First Respondent the Appellant instituted proceedings under Section 101 of the Maharashtra Co-operative Societies Act, 1960. The proceedings culminated in the issuance of a recovery certificate dated 14th September, 2006 in the total sum of Rs.4,09,79,406/-. The Appellant was awarded further interest on the principal sum of Rs.2,70,12,694/- at the rate of 14% per annum from 1st July, 2006 till payment or realization.

2. The Third Respondent to the Appeal had instituted two arbitration petitions (Arbitration Petitions 242 and 66 of 2005) against the First Respondent under Section 9 of the Arbitration and Conciliation Act, 1999 for interim relief pending arbitral proceedings. The Appellant was not a party to the arbitral agreement. On 16th July, 2005 an order was passed in Arbitration Petition 242 of 2005 by which the Second Respondent (The Bangalore Water Supply and Sewerage Board) was directed to deposit in this Court a sum of Rs.2.12 Crores owed by the Second Respondent to the First Respondent. The Second Respondent deposited the amount in compliance with the order of the Court.

By an order dated 7th March, 2006 the arbitration petitions were finally disposed of by a direction pursuant to which the First Respondent was permitted to withdraw the amounts by furnishing a bank guarantee of a nationalized bank within a period of eight weeks, failing which the amount was to be invested in a nationalized bank. The First Respondent did not withdraw the amount which accordingly is stated to have been invested in terms of the order. The arbitral proceedings between the First and Third Respondents are pending.

3. Upon the issuance of a recovery certificate in favour of the Appellant on 14th September, 2006, the Appellant filed a Judges Order (Judges Order 494 of 2006) before the Learned Single Judge for a direction that the amount deposited by the Second Respondent in this Court be paid over to the Appellant in partial satisfaction of the decree. In the meantime, the Fourth Respondent had in arbitral proceedings against the First Respondent secured in its favour an award for a sum of Rs.91,61,727.42. In execution, the Fourth Respondent filed

Chamber Summons 530 of 2005 and 124 of 2007 inter alia for an order directing a disclosure of assets by the First Respondent; an order restraining the First and Third Respondents from withdrawing the amounts deposited in Court by the Second Respondent and for an order permitting the Fourth Respondent to withdraw the amounts deposited towards satisfaction of the award in favour of the Fourth Respondent.

4. The Chamber Summons and the Judges Order were disposed of by the impugned judgment and order dated 15th February, 2007 of the Learned Single Judge. The Learned Single Judge held that (i) a prima facie case was made out that the recovery certificate under Section 101 of the Maharashtra Co-operative Societies Act in favour of the Appellant was fraudulently obtained; (ii) Rule 107 of the Maharashtra Co-operative Societies Rules 1961 laid down the procedure for attachment and sale of property which application had not been made by the Appellant; and (iii) An application was not maintainable by way of a Judges Order. The Learned Single Judge granted relief to the Fourth

Respondent inter alia permitting the Fourth Respondent to withdraw a sum of Rs.91,61,727.42 from the amounts deposited before this Court.

5. The Appeal has been filed before the Court to challenge the order of the Learned Single Judge. On behalf of the Appellant, the order of the Learned Single Judge has been questioned by submitting firstly, that recourse to the procedure of a Judges Order was validly taken by the Appellant. Relying on the provisions of Section 101(3) and Section 156(1)(e) of the Maharashtra Co-operative Societies Act, 1960 and Rule 107 of the Rules framed under the Act, it was urged that a certificate granted by the Registrar is final and conclusive proof of the arrears stated therein and the Act together with the Rules provide the mode in which a recovery certificate can be executed. Execution could, therefore be only in accordance with the mode prescribed by the Act and the Rules and this position was affirmed in a judgment of a Division Bench of this Court in **M/s. Satguru Construction Co. Pvt. Ltd. v. Greater Bombay Co-operative Bank Limited** (Appeal 136 of 2007

decided on 26th February, 2007). Secondly, it was submitted that the Learned Single Judge had fallen in error in entering a prima facie finding that the recovery certificate was vitiated by fraud. Such a finding, it was submitted, was without jurisdiction and was in the teeth of Section 163 under which decisions, orders and awards under the Act are final, subject to an appeal or revision. The exclusion of the civil courts was relied upon. Thirdly, it was sought to be urged that the Learned Single Judge had erred in entering a finding of fraud or collusion in the absence of pleadings and particulars. Moreover, it was urged that the effect of the order was to preclude the Appellant from recovering any amount under the recovery certificate on a prima facie finding of fraud and collusion. Hence, it was urged that the order of the Learned Single Judge is clearly unsustainable and is liable to be set aside.

6. On behalf of the Third Respondent, it has been urged that the recovery certificate which is obtained by the Appellant against the First Respondent does not bind the Third Respondent which was not a party to the recovery proceedings under Section

101 of the Act. The submission was when the recovery certificate is utilized to affect the rights of the Third Respondent, it is open to the Third Respondent to plead that the recovery certificate was not binding qua the Third Respondent. The Third Respondent, it was submitted does not challenge the recovery certificate per se nor does it seek to set side the recovery certificate. In such a case, the bar contained in Section 163 of the Act would not be attracted. The principle that an executing Court cannot assail the validity of a decree would hold good only between the parties to the decree and when a third party against whom an order is served moves the executing Court to decide the validity of the decree, the executing Court would have inherent jurisdiction to do so. Secondly, it was urged that the Appellant had moved this Court to execute the recovery certificate by attaching and withdrawing the monies which have been deposited by the Second Respondent as a garnishee in this Court pursuant to an order passed in an arbitration petition against the First Respondent, pending the arbitral proceedings. The said deposit was to secure the claim of the Third Respondent against the First Respondent and if the Appellant was allowed to

withdraw the amount so deposited, the rights of the Third Respondent would be seriously prejudiced. Thirdly, it was urged that it is a settled principle of law that a judgment or a decree obtained by playing fraud would be a nullity and non est in the eyes of law. Therefore, it was urged that it is open to the Third Respondent to demonstrate before the Learned Single Judge that qua the Third Respondent, the recovery certificate would have no existence in the eyes of law.

7. On behalf of the Fourth Respondent, it has been urged that (i) The Appellant has sought the execution of the recovery certificate under Section 101 of the Maharashtra Co-operative Societies Act, 1960 by instituting proceedings before this Court which were not maintainable. The mode of execution of a recovery certificate is prescribed by Section 156 read with Rule 107. A civil Court would have no jurisdiction to entertain execution proceedings; (ii) The recovery certificate obtained by the Appellant was on the basis of fraud and it was open to this Court at any stage of the proceedings to decline relief to the Appellant; (iii) The Fourth

Respondent is executing the award in its favour which has the effect of a decree of the Court. Accordingly, recovery proceedings have been initiated on 30th October, 2004 in respect of an award dated 2nd April, 2003 against the First Respondent for a sum of Rs.91,61,547/-. The award / decree in favour of the Fourth Respondent is prior in point of time and the Fourth Respondent is entitled to the recovery of the decretal amount lying deposited with this Court; (iv) The Appellant is an unsecured creditor and has no precedence over the amounts lying deposited in this Court; (v) Under Rule 107(7)(iii) the question of priority has to be determined by the Court in whose custody the attached property is situated and at the highest the Appellant can seek attachment of the amounts lying deposited with the Court. Questions as regards title and priority would have to be determined by the Court which has custody of the property.

8. In deciding upon the correctness of the rival submissions and adjudicating upon the challenge to the order of the Learned Single Judge, it would at the outset be necessary to have regard to

the provisions of the Maharashtra Co-operative Societies Act, 1960 having a bearing on the subject. The Appellant as a co-operative bank had obtained a recovery certificate against the First Respondent under sub section (1) of Section 101 of the Maharashtra Co-operative Societies Act, 1960. Sub section (3) of Section 101 postulates that a certificate granted by the Registrar under sub sections (1) or (2) shall be final and conclusive proof of the arrears stated to be due therein. The amount stated is recoverable according to the law for the time being in force for the recovery of land revenue. Under Section 156 the Registrar or any officer empowered by him or an officer of a society as notified by the State Government is empowered, without prejudice to any other mode of recovery provided by the Act to recover any amount due under a certificate granted by the Registrar under Section 101 together with interest, by the attachment and sale and by sale without attachment of the property of the person against whom the order has been passed. Rule 107 of the Maharashtra Co-operative Societies Rules 1961 lays down the procedure for the attachment and sale of property under Section 156. Clause (iii) of

sub rule (7) of Rule 107 provides for the mode of recovery where the property to be attached is in the custody of any Court or public officer. The relevant provisions in that regard are as follows :

“(iii) Where the property to be attached is in the custody of any Court or public officer, the attachment may be made by notice to such Court or officer requesting that such property and any interest or dividend becoming due thereon may be held subject to the further demands of the Recovery Officer issuing the notice:

Provided that, where such property is in the custody of a Court or Recovery Officer of another district, any question of title or priority arising between the applicant and any other person not being the defaulter, claiming to be interested in such property by virtue of any assignment, attachment or otherwise shall be left to be determined by such court or Recovery Officer.”

9. In a situation where the property to be attached is in the custody of a Court, attachment is levied by a notice to the Court in the form of a request that the property be held subject to the further demands of the Recovery Officer issuing the notice. The proviso thereto inter alia deals with a situation wherein the property is in the custody of a Court or recovery officer of another district. The Court is empowered to determine a question of title or priority

arising between the applicant and any other person, not being the defaulter, claiming to be interested in such property. The interest of a third party may be by virtue of any assignment, attachment or otherwise. Questions of priority and title have to be decided by the Court in whose custody the property is situated.

10. Two consequences emanate from the provisions made by the legislature in the Maharashtra Co-operative Societies Act, 1960 and by its delegate in the exercise of the statutory rule making power. The first consequence is that the legislature has prescribed the mode in which a recovery certificate under Section 101 of the Act can be enforced or executed. Section 156 provides that without prejudice to any mode of recovery provided by or under the Act, the amount due under a recovery certificate issued under Section 101 can be recovered by attachment and sale or by sale without attachment of the property of the person against whom the recovery certificate is issued. Rule 107 as already noted provides for the procedure for attachment and sale of property under Section 156. The Act and the Rules lay down a

comprehensive code for enforcement of a recovery certificate issued under Section 101. This position in law has been reiterated in a judgment of a Division Bench of this Court in **Satguru Construction Co. Pvt. Ltd. v. Greater Bombay Co-operative Bank Limited** (Appeal 136 of 2007 decided on 26th February, 2007). That was a case in which a Learned Single Judge of this Court had issued a warrant of arrest for non-discharge of a liability arising out of a recovery certificate issued under Section 101. The proceedings were sought to be pursued in terms of Rule 37 of Order 21 of the Code of Civil Procedure 1908 and the order of the Learned Single Judge disclosed that as a result of the refusal of the debtor to pay his debt in accordance with the recovery certificate, action under Section 51(b) of the Code of Civil Procedure Code was attracted and a warrant of arrest was issued. The Division Bench inter alia relied on the provisions of Section 156(1) and Rule 107 and observed that while Section 156 specifies that proceedings for recovery of an amount due under a recovery certificate shall be without prejudice to any other mode of recovery, the other mode spoken of was a mode provided by or under the

Act and not under any other mode or statute. The Division Bench adverted to Section 163 under which a finality was imparted to decisions, orders and awards passed under the Act subject to appeal and to the provisions under which orders, decisions or awards under the Act could not be revised or declared void by any Court. The consequence was enunciated in the following observations of Hon'ble Shri Justice R.M. S. Khandeparkar, speaking for the Division Bench :

“It is settled law that the execution proceeding is continuation of a suit. Once it is clear that no suit is maintainable for settling dispute which could be referred to the decision of the Co-operative Court, and further the provisions of law comprised under Section 101 r/w Section 156 clearly provide that recovery certificate issued thereunder is executable in terms of the provisions of law comprised under Section 156 and the rules made in that regard by the Government, and the Government having made rule in that respect being Rule 107 of the said Rules, it would not be open for the parties to adopt a mode different than the one specifically provided under the said Act r/w the said Rules. Once the statutory provisions specifically provide the mode for, execution of a recovery certificate, and to recover the dues in terms of such recovery certificate, then it is not open for the parties to choose a totally different mode and ignore the mandate of Section 163 of the said Act. The jurisdiction of the civil Court clearly stands ousted in that regard.”

11. The second consequence is that when the property to be attached is in the custody of the Court, an attachment can be made by a notice to the Court requesting that the property be held subject to further demands of the Recovery Officer issuing such notice. Where the property is in the custody of the Court, questions of title or priority have to be determined by that Court. That is the plain mandate of Rule 107(7)(iii).

12. The judgment of the Division Bench in **Satguru Construction** is authority for the proposition that as between the parties to a proceeding which culminates in the issuance of a recovery certificate under Section 101, the mode of recovery is that which is specified under the Act and the rules framed thereunder. Recourse therefore cannot be taken for the execution of a recovery certificate outside the fold of procedure provided by the Act and by the Rules. It is, however, necessary to emphasis that the decision of the Division Bench deals with a situation where a recovery certificate was sought to be executed by a party in whose favour

the certificate was issued against the party from whom the debt was due and owing thereunder. Applying the principle in the present case, what would emerge therefore is that the Appellant in whose favour a recovery certificate was issued, would have to take recourse to the mode of execution prescribed in Section 156 of the Act read with Rule 107 of the Rules. In the present case, the property to be attached consisted of money which had been deposited in pursuance of the directions passed by this Court in an arbitration petition instituted by the Third Respondent under Section 9 of the Act. Whether the Appellant was entitled to any part of those proceeds is a separate matter altogether which will be dealt with subsequently. At this stage it would suffice to note that the attachment if at all could only be effected by a request made to this Court where the monies were lying deposited in terms of the provisions of Clause (iii) of sub rule (7) of Rule 107. The Judges Order filed by the Appellant can be regarded and treated as a request for attachment in terms of the aforesaid provision. By the Judges Order, however, the Appellant sought the permission of the Court not only to attach but to withdraw certain sums of money

which were lying in deposit. Obviously there could be no question of the Appellant being permitted to withdraw any amount unless the question of title and priority was determined in terms of the proviso to clause (iii) of sub rule (7) of Rule 107. The Judges Order, properly speaking, must be confined to making such a request in terms of Rule 107(7)(iii), and it would be for the Court to determine questions of title or priority.

13. The Learned Single Judge held that the recovery certificate issued in favour of the Appellant was prima facie vitiated by fraud or collusion as between the Appellant and the First Respondent. The Appellant contends that it was not open to this Court to entertain any dispute in regard to the validity of the recovery certificate and, once issued, the recovery certificate would be regarded as final and binding particularly in the context of sub rule (iii) of Rule 107(7) and Section 163 of the Act. The Appellant urged that it was for any person aggrieved by the recovery certificate to take recourse to the remedy provided by Section 154 of the Act and absent recourse to such a remedy, this Court had no

jurisdiction to entertain a challenge on the ground that the recovery certificate was vitiated by fraud or collusion. The judgment of the Division Bench in **Satguru Construction** (supra) was pressed into aid in this regard.

14. The Third Respondent is a stranger to the recovery proceedings under Section 101. During the course of the submission counsel appearing for the Third Respondent clarified that it was not the case of the Third Respondent that the recovery certificate was vitiated per se. Hence, it was submitted that it was open to the Appellant to take recourse to its remedies as against the First Respondent for the execution of the recovery certificate. However, the contention of the Third Respondent is that as against the Third Respondent who is a stranger to the recovery proceedings, the recovery certificate cannot be regarded as binding. There is merit in the submission. In **M. and S.M. Railway V. Rupchand Jitaji**¹, a Division Bench of this Court held that the principle that the executing Court cannot challenge the validity of a decree holds good only between the parties to the decree. Both

¹ AIR (37) 1950 Bombay 155.

the Third and the Fourth Respondents are not parties to the recovery proceedings under Section 101. In fact, it merits reiteration that the submission of the Third Respondent before the Court is not that the recovery certificate should be set aside per se, but that if the recovery certificate is set in execution, the Third Respondent can urge that it is not binding upon it when it is utilized to affect the rights of the Third Respondent. In such a situation, there is no occasion for the Third Respondent to avail of the remedy of a revision provided by Section 154 of the Maharashtra Co-operative Societies Act, 1960 since it is not the contention of the Third Respondent that the recovery certificate should be set aside in toto. The Judges Order taken out by the Appellant is a request for attachment to this Court in terms of Rule 107(7)(iii). Questions of title and priority have to be determined by this Court. It is open to the Third Respondent to set up the defence that as a third party who is a stranger to the proceedings for recovery under Section 101, the Third Respondent is not bound by the recovery certificate. The bar of jurisdiction contained in sub section (3) of Section 163 (by which all orders, decisions or awards passed in

accordance with the Act or Rules are final and are not liable to be challenged in any Court upon merits or upon any other grounds) would not apply to a party in the position of the Third Respondent who is a stranger to the proceedings. The Third Respondent is a party at whose behest monies due and owing by the Second Respondent to the First Respondent were directed to be deposited in an arbitration petition under Section 9. Upon the proceedings set in motion by the Appellant for the attachment of those proceeds towards satisfaction of the dues of the Appellant under the recovery certificate, it is open to the Third Respondent to urge all defences that may be available in law to safeguard such rights as it asserts. Title to those proceeds and priority as between rival claimants will be decided by the Court.

15. Hence, upon a request made to the Court in whose custody the property is situated, in terms of Rule 107(7)(iii) the question of title or priority has to be decided by the Court. None of the counsel appearing before this Court in the present proceedings has disputed the position that the question of priority is a matter to

be decided by the Learned Single Judge. There is merit in the contention of the Appellant that the Learned Single Judge was in error in discarding the legality of the recovery certificate issued in favour of the Appellant on the basis of a prima facie finding that the recovery certificate was vitiated by fraud or collusion between the Appellant and the First Respondent. The Appellant is justified in submitting that this amounts virtually to setting aside the recovery certificate on the basis of a prima facie finding. The contention of the Appellant is also that there were neither any pleadings nor any evidence to justify the determination. In fact, a perusal of the order of the Learned Single Judge would indicate that the question of priority has not been decided. We do not consider it appropriate to decide questions of title and priority for the first time, in appeal. It was fairly conceded before the Court by all the learned counsel that it would be appropriate and proper that the learned Single Judge should decide the questions of title and priority afresh after hearing the parties on such submissions as they may seek to advance.

16. In these circumstances, the Appeal shall have to be allowed and shall accordingly stand allowed. The judgment and order of the Learned Single Judge shall stand set aside. The proceedings shall stand remitted back to the Learned Single Judge. Upon remand, the Learned Single Judge is requested to re-examine the questions of title and priorities as between the contesting claimants after furnishing the parties with an opportunity of being heard. In the circumstances of the case, there shall be no order as to costs.

(R.M. S. KHANDEPARKAR, J.)

(DR.D.Y. CHANDRACHUD, J.)